



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Sanford and Sons Company

File: B-231607

Date: September 20, 1988

DIGEST

Although an agency may use traditional responsibility factors, like prior performance, as technical evaluation factors where its needs warrant a comparative evaluation of proposals, an agency's rejection of a small business firm's offer as unacceptable under such factors was improper where the agency's decision did not reflect a relative assessment of the offer but instead effectively constituted a finding of nonresponsibility.

DECISION

Sanford and Sons Company protests the rejection, as technically unacceptable, of the proposal it submitted in response to request for proposals (RFP) No. DACW69-88-R-0004, issued by the Army Corps of Engineers. The solicitation, a 100 percent small business set-aside, sought a contractor to provide buildings and grounds maintenance at Bluestone Lake, West Virginia.

We sustain the protest.

The RFP, issued on November 16, 1987, provided that award would be made to the technically qualified offeror that submitted the lowest price proposal. The RFP further provided that proposals would be evaluated under the following criteria: (a) specialized experience in the work required; (b) necessary capacity to complete the work in the required time; (c) necessary equipment to perform the contract; (d) organization/administration; (e) satisfactory performance record; and (f) the offeror's latest financial statement.

Three offerors responded to the RFP. Sanford submitted the lowest price, but the evaluation panel judged Sanford's proposal to be technically unacceptable. The Corps therefore awarded the contract to Bret Whitten, the next low

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offeror. Sanford protests this decision, arguing that the Corps improperly found the firm's proposal unacceptable.

The Corps reports that during 1987 Sanford was the Corps' grounds maintenance contractor for two areas in West Virginia, East Lynn and Beech Fork. The Corps states that in reviewing Sanford's proposal the evaluation panel considered the files for these contracts and found that Sanford's performance was substantially deficient under the East Lynn contract. More specifically, the file revealed that Sanford had been issued six Contract Discrepancy Reports (CDRs)^{1/} for inadequate performance. The file indicated that Sanford had inadequate quality controls and did not administer its contracts well and, as a result, the government had to perform what the Corps viewed as an excessive number of inspections. In addition, the file indicated that following the fourth CDR Sanford was requested to, but did not, correct its quality control program, and that Sanford failed to keep a quality control inspection file required by the contract. The file also was replete with instances in which government inspectors found inadequate performance and requested Sanford to reperform but did not issue CDRs.

Sanford's proposal was rejected because, based on this information, the panel determined that the offer was unacceptable in the areas of (1) organization/administration, under which contractors were required to demonstrate that the capability, background and experience of the personnel responsible for the administration and performance of the contract were such as to insure successful performance of the work effort required by the contract, and (2) past performance.

The technical factors on which Sanford's proposal was judged technically unacceptable--organization/administration and past performance--traditionally are considered responsibility factors, that is, matters relating to Sanford's ability to perform the contract. See Federal Acquisition Regulation (FAR) §§ 9.104-1(c), (e) (FAC 84-18). As the Corps notes, we have stated that traditional responsibility factors may be used as technical evaluation criteria in a negotiated procurement. See, e.g., Pacific Computer Corp., B-224518.2, Mar. 17, 1987, 87-1 CPD ¶ 292. In doing so, however, we have stated that, as a general matter, the factors may be so used only if the agency's needs warrant a

^{1/} A Contract Discrepancy Report is a formal document used by the government to process defects in service.

comparative evaluation of those areas. SBD Computer Services Corp. B-186950, Dec. 21, 1976, 76-2 CPD ¶ 511. We have cautioned that an agency may not find that a small business is nonresponsible under the guise of a relative assessment of responsibility factors and thus avoid referring the matter to the Small Business Administration (SBA), which has ultimate authority to determine the responsibility of a small business concern. See 52 Comp. Gen. 47 (1972).

Here, the record shows that the Corps did not use the responsibility-type technical evaluation factors for purposes of a comparative evaluation of the merits of the proposals it received. Rather, a proposal was to be found acceptable or not on a pass/fail basis, and Sanford's offer was rejected solely because of the firm's poor prior performance--Sanford clearly would have been denied the contract no matter how the rest of its proposal was judged. Under these circumstances, we think it apparent that the panel's finding that Sanford's proposal was technically unacceptable constituted, in fact, a determination that Sanford was not a responsible contractor.

Under the Small Business Act, 15 U.S.C. § 637(b)(7) (1982), the SBA has conclusive authority to determine the responsibility of a small business concern. Thus, when a procuring agency finds that a small business is nonresponsible, the agency is required to refer the matter to the SBA for a final determination under the Certificate of Competency (COC) procedures. See ECS Metals Limited, B-229804, Feb. 10, 1988, 88-1 CPD ¶ 136.

Given our conclusion that Sanford effectively was found nonresponsible, and since the RFP's evaluation scheme is not designed for a comparative assessment of the proposals, we recommend that the matter be referred to the SBA, since Sanford is a small business. If the SBA issues a COC to Sanford, the contract awarded to Brett Whitten should be terminated for the convenience of the government and an award should be made to Sanford, if otherwise appropriate. We also find Sanford entitled to the costs incurred in

pursuing this protest. 4 C.F.R. § 21.6 (1988); see Kirila Contractors, Inc., B-230731, June 10, 1988, 67 Comp. Gen. ___, 88-1 CPD ¶ 554.

The protest is sustained.

for James F. Hendon
Comptroller General
of the United States